

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARRON'S ELECTRIC SERVICE, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1977	:	
through August 31, 1980.	:	

Petitioner, Harron's Electric Service, Inc., 80 West Main Street, Gouverneur, New York 13642, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1977 through August 31, 1980 (File No. 68579).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 24, 1986 at 9:00 A.M., with all briefs to be submitted by November 3, 1986. Petitioner appeared by Sheldon G. Kall, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the petition for redetermination herein was timely filed.

FINDINGS OF FACT

1. On December 7, 1981, the Audit Division issued to petitioner, Harron's Electric Service, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1977 through August 31, 1980 asserting \$10,191.79 in taxes due together with interest of \$2,105.18 for a total amount due of \$12,296.97. 2. On March 9, 1982 the Tax Appeals Bureau of the State Tax Commission received the petition of Harron's Electric Service, Inc., protesting the aforementioned notice of determination and demand. The envelope in which the petition was wrapped bore a machine-metered stamp dated March 4, 1982.

3. Petitioner contended that the petition was deposited in a United States Postal Service mailbox on March 4, 1982. Petitioner's representative further contended that certain representatives of the Audit Division had advised him that the matter of timeliness of the petition herein would be "taken care of" and that petitioner would therefore receive a hearing on the merits of its claim. The record, however, is devoid of any indication that any such representations were made.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides that a notice of determination finally and irrevocably fixes the tax unless the person against whom the tax is assessed makes an application for hearing within 90 days "after the giving of notice of such determination". Additionally, section 1147(a)(1) of the Tax Law provides that "[a]ny period of time which is determined according to the provisions of [Article 28] by the giving of notice shall commence to run from the date of mailing of such notice." (Emphasis supplied.) Accordingly, the tax assessed herein against petitioner is final unless petitioner filed a petition protesting said assessment within 90 days of December 7, 1981, the date of mailing of the notice.

B. That Tax Law § 1147(a)(2) provides, in pertinent part:

"If any return... or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed..., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery... If any document is sent by United States registered mail, such registration shall be prima facie evidence that such documentation was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section." (Emphasis supplied.)

C. That, during the period at issue, 20 NYCRR 601.3(c) provided in pertinent part:

"(c) Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, N.Y. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope.

Where a machine metered stamp is used on the envelope, the petition shall be deemed filed upon receipt." (Emphasis supplied.)

D. That pursuant to section 1147(a)(2) of the Tax Law and 20 NYCRR 601.3(c), for a petition to be timely, it must have been actually delivered to the Tax Commission within ninety days after a notice is properly mailed, or it must have been delivered in an envelope which bears a United States postmark of a date within the ninety day period (see Matter of Micro-Carburetor Corporation, States Tax Commission, June 30, 1986).

E. That petitioner's March 4, 1982 petition was not delivered to the Tax Commission within the prescribed ninety day period. Said petition was, in fact, delivered to the Tax

Commission 92 days from the date of mailing of the notice; it was mailed by way of metered mail; and did not bear a United States postmark. Accordingly, petitioner failed to timely file a petition protesting the assessment.

F. That the petition of Harron's Electric Service, Inc., is in all respects denied and the notice of determination and demand, issued December 7, 1981, is sustained.

DATED: Albany, New York
February 19, 1988

ADMINISTRATIVE LAW JUDGE